No. 85-915

Supreme Court, U.S.
FILED
NOV 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE:
"SEARCH WARRANTS"

UNITED STATES OF AMERICA

Respondents,

-against-

THE LAW FIRM OF DANIEL P. FOSTER, P.C.

Petitioners.

SUPPLEMENTAL APPENDIX

KIT CONELLY DECIOUS
THE LAW FIRM OF
DANIEL P. FOSTER, PC
145 West 55th Street
Suite 15A
New York, New York 10019

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE:

"SEARCH WARRANTS"

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United States of America

Respondents,

-against-

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Petitioners.

ERRATA SHEET

A. Delete page A-1 through A-10 of the original appendix in favor of pages A-1 through A-9 in the supplemental appendix.

B. Delete pages A-11 through A-15 of the original appendix.

Judgment of the United States Court of Appeals for the Second Circuit

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of July, one-thousand nine hundred and eighty-five.

Present: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal, *
District Judge

UNITED STATES OF AMERICA,

Appellee.

v.

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Appellant.

No. 85-1127

Appeal from the United States Distr
Court for the Eastern District of New Yor

This cause came on to be heard on th
transcript of record from the United Stat
District Court for the Eastern District o
New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now
hereby ordered, adjudged and decreed that
the order of said District Court be and i
hereby is affirmed in accordance with the
oral opinion rendered in open court.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro
Deputy Clerk

*United States District Judge for the Southern District of New York sitting by designation.

Transcript of the United States
Court of Appeals
for the Second Circuit,
Oral Opinion

UNITED STATES COURT OF APPEALS

For The Second Circuit

In re "Search Warrants",

The Law Firm of Daniel P. Foster, P.C.

versus

United States of America

- -

BEFORE: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal
District Judge

U.S. District Court
Foley Square
New York, New York

July 19, 1985
1:14 P.M.

THE COURT: Thank you.

With repsect to the latter argued appeal, number 851127, the appeal seeks reversal of Judge Bramwell's Order unsealing an affidavit upon which a search warrant was issued for the premises of the Law Firm of Daniel P. Foster, P.C.

The 1979 Supreme Court case of Nixon versus Warner Communications, Incorporated, 435 U.S. 589, makes it clear that the standard of review in such a case is whether the District Court abused its discretion.

In our view, Judge Bramwell did not abuse his discretion. For this reason, the Order of the District Court is affirmed and it is so ordered.

Transcription of Order of July 19, 1985

Decision and Order of the United States District Court for the Eastern District of New York

No. 84 Misc. 149

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Present: Honorable Henry Bramwell
District Judge

EX PARTE DECIOUS, ET AL.

IN RE "SEARCH WARRANTS,"

Pursuant to an order to show cause dated April 5, 1985, Kit Conelly Decious, Esq. requests that this Court issue an order vacating a March 29, 1985 order, which unsealed an affidavit in support of a search warrant executed on the law offices of Daniel Foster and Associates on or about February 17, 1984, and mandating that the affidavit be resealed pending application of the United States Attorney to unseal by motion or application on notice. After careful consideration of the affidavit and memo-

randa of law submitted by Ms. Decious and the applicable case law, the Court is of the opinion that her request must be denied.

Rule 41(g) of the Federal Rules of Criminal Procedure provides that all papers concerning a search warrant shall be filed with the Clerk of the Court. Although the rule does not specifically refer to affidavits, the requirement that "all other papers in connection therewith" shall be filed seems to encompass them. In Re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207 (D.R.I. 1980). Thus, those courts which have considered applications to seal or unseal affidavits have assumed that sealing is an extraordinary action. Id. at 209. (Citation omitted). Indeed, the policy underlying public access to court records is an important one. Id. See also, United States v. Hubbard, 650 F.2d 293, 317-18 (D.C.Cir. 1980).

On the other hand, this Court has inherent power to seal affidavits "as an

incident of [its] constitutional function, to control papers filed with the courts within certain constitutional and other limitations." In re Sealed Affidavit(s) to Search Warrants, 600 F.2d, 1256, 1257 (9th Cir. 1980). The decision to seal is clearly a discretionary matter to be exercised in light of the relevant facts and circumstances of a particular case. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

In this case, the applicant argues that the affidavit in question should remain sealed because it relates to a grand jury matter. In support of her application, Ms. Decious relies on 6(e) of the Federal Rules of Criminal Procedure which prohibits disclosure of "matters occuring before the grand jury." The veil of secrecy, however, covers the grand jury proceedings not the subject matter of the investigation. In Re Search Warrant, supra, 489 F. Supp. at 211. A careful reading of the affidavit

in issue does not indicate that it stems from grand jury proceedings. On the contrary, paragraphs 24 and 25 simply state that grand jury subpoenas duces tecum were served on Ms. Decious and Mr. Foster on February 16, 1984 and that both parties appeared before Judge Nickerson to contest the validity of the subpoenas. This is insufficient to bring the affidavit within the purview of Rule 6(e).

In so finding the Court is cognizant of the fact that the government cited the secrecy of the grand jury proceedings as one of its arguments in support of its original application to seal the affidavit. The Court notes, however, that in granting the original application, it relied primarily on the other two reasons cited by the government which no longer apply. Had the government relied solely on Rule 6(e), its application to seal would likewise have been denied.

For the reasons stated above, application to vacate the March 29, 1985 order and to reseal the affidavit in question is denied in all respects.

SO ORDERED.

Henry Bramwell
U.S.D.J.

Dated: Brooklyn, New York
April 8, 1985